RESPONSE REQUESTED

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Supreme Court, U.S.
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No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court may dismiss an untimely appeal that was improperly authorized by a district court, when the appellee has timely raised the argument that the appellant's notice of appeal was untimely.

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INTRODUCTION

This case, in which habeas petitioner Keith Bowles challenges the Sixth Circuit's dismissal of his appeal as untimely, does not warrant review, because the Sixth Circuit's decision involves a routine application of the strict notice of appeal deadlines set forth in Federal Rules of Appellate Procedure 3, 4(a)(6), and 26(b). Contrary to Bowles's assertions, the Sixth Circuit's decision does not conflict with or even implicate *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403 (2005), as the Sixth Circuit properly distinguished *Eberhart* on two grounds. Also contrary to Bowles's assertion, the Sixth Circuit's decision does not conflict with the Court's precedent permitting deadline flexibility under narrowly prescribed "unique circumstances." Indeed, it is Bowles's interpretation of the unique circumstances doctrine that conflicts with Court precedent, as it would create an exception that swallowed the rule. Finally, the Sixth Circuit's decision is correct on the merits.

The decision below was a straightforward application of the mandatory deadlines set forth in the Federal Rules of Appellate Procedure (the "Rules"). Rule 3 permits a party to take an appeal of right from a district court to a court of appeals "only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Rule 4 gives a party thirty days from the district court's judgment to file a notice of appeal, but creates exceptions to this deadline in specific circumstances. Relevant to this case, Rule 4(a)(6) permits the district court to "reopen the time to file an appeal for a period of 14 days" if a party failed to receive the proper notice from the district court of the entry of the judgment. Rule 26(b) prohibits district courts from extending the time to file a notice of appeal "except as authorized in Rule 4." The district court improperly granted Bowles an extension of more than fourteen days under Rule 4(a)(6), and

Bowles filed his notice of appeal on the sixteenth day. In his brief to the Sixth Circuit, the Warden argued that Bowles's appeal should be dismissed for lack of jurisdiction because his notice of appeal was untimely. The Sixth Circuit properly credited the Warden's argument and dismissed Bowles's appeal. The case is simple, and Bowles's efforts to find conflict and confusion fail.

Bowles cannot demonstrate any conflict between the decision below and the Court's decision in *Eberhart*. The Sixth Circuit distinguished *Eberhart* on two grounds. First, unlike the appellee in *Eberhart*, the Warden never forfeited his argument that Bowles's appeal was untimely. The Warden explicitly raised the issue in the jurisdictional statement of his appellate brief. Second, the Sixth Circuit noted that the Federal Rules of Appellate Procedure governing when an appeal may be taken, unlike the Federal Rules of Criminal Procedure at issue in *Eberhart*, may be characterized as a "prescription[] delineating the classes of cases" falling within federal appellate courts' jurisdiction. See Pet. App. 14 n.1 (citing *Kontrick v. Ryan*, 540 U.S. 443 (2004)). Thus, the court added that even if the appellee had forfeited his timeliness argument, *Eberhart* did not alter the court's responsibility to police its own jurisdiction and to dismiss untimely appeals. Pet. App. 13-14 & n.1.

Insofar as *Eberhart* leaves open the question whether Rule 4(a) is jurisdictional or not, the question is not ripe for the Court's review. Bowles's case does not offer a proper vehicle for examining whether notice of appeal deadlines are jurisdictional or subject to forfeiture, because here no forfeiture occurred, making the issue irrelevant. For the same reason, circuit courts that have identified the issue have found no need to answer it. Of the handful of courts offering analysis on the issue, all have reached the same conclusion as the Sixth Circuit.

Bowles also cannot demonstrate any conflict between the decision below and the other Court cases he cites, including *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964). The Sixth Circuit properly cited *Harris Truck* and its progeny and discussed at length the appropriate rule of law. The Sixth Circuit then properly applied the narrow unique circumstances doctrine to the facts of Bowles's case by concluding that no such unique exception excused Bowles's untimely appeal. Bowles's argument—namely, that he falls into an exception contemplated by *Harris Truck* and *Thompson*—must fail, because excusing untimeliness whenever a district court improperly calculates a notice of appeal deadline would render Rule 26(b) a dead letter.

Finally, Bowles's miscellaneous arguments that the Sixth Circuit erred in applying Rule 4(a)(6) do not warrant the Court's attention, because they are unsupported by any authority, contradict the plain language of the Rule, and in any event do not justify review here.

In sum, Bowles has not identified any reason, compelling or otherwise, for the Court to review the case. Bowles's assertions that the decision below conflicts with Court precedent are false. Bowles's petition for certiorari reduces to a complaint of ordinary error by the circuit court in a case where no error occurred. The Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

An Ohio jury convicted Petitioner Keith Bowles of murder for his participation in a group beating of an unarmed victim; the beating led to the victim's death. See Pet. App. 12. After exhausting his opportunities for direct appeal in state court, Bowles filed a federal petition for a writ of habeas corpus. *Id.* The case was assigned to a magistrate judge, who issued a report and recommendation that the petition be denied. *Id.* Bowles objected to the report. *Id.* The district

court adopted the magistrate judge's report and recommendation and denied Bowles a certificate of appealability. Pet. App. 20-22. Bowles moved for a new trial under Rule 59 or to amend the judgment under Rule 52. The district court entered the final appealable order denying both of Bowles's motions on September 9, 2003.

Over three months after the final order, on December 12, 2003, Bowles moved to vacate the district court's September 9 order and to reopen the appeal period pursuant to Federal Rule of Appellate Procedure 4(a)(6). He argued that he was never served the order and that he was not aware of the final appealable order against him until December 5, 2003. In a marginal order entered February 10, 2004, the district court denied his motion to vacate and granted his motion to reopen time for appeal. Under Rule 4(a)(6), the district court may reopen the time to appeal for a period of fourteen days. Despite this fourteen-day limit, the district court order gave Bowles seventeen days, or until February 27, 2004. See Pet. App. 23.

Bowles filed his notice of appeal on February 26, 2004, sixteen days after the district court granted his motion to reopen the appeal period. Noting that Bowles's notice of appeal fell outside of the fourteen-day window permitted under 4(a)(6), the clerk's office of the Sixth Circuit issued an order to show cause why the appeal should not be dismissed as untimely. Bowles responded that he had relied upon the district court's order, which said that he could file his response up to and including February 27, 2004.

On April 26, 2004, a three-judge panel of the Sixth Circuit dismissed Bowles's appeal for lack of jurisdiction, noting that "[c]ompliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite." Although the court dismissed Bowles's appeal as to the district court's denial of his petition for a writ of habeas corpus and its denial of his motion for a new

trial or to alter or amend the judgment, the court inexplicably concluded that "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling." The February 10 ruling was the order denying Bowles's motion to vacate and granting Bowles's motion to reopen the time for appeal, an order that Bowles's notice of appeal did not purport to be appealing. Next, by order dated September 8, 2004, the court construed Bowles's appeal as an application for a certificate of appealability, and denied the application.

Bowles moved for reconsideration, arguing the merits of his habeas claims but ignoring his procedural default. The court did not request a response from the Warden. On December 28, 2004, a new three-judge panel—apparently unaware of the first panel's conclusion that Bowles's appeal was procedurally barred—granted Bowles a certificate of appealability on one of his habeas issues.

The parties completed briefing on April 25, 2005. In the Warden's jurisdictional statement in his brief to the Sixth Circuit, he argued that the court lacked jurisdiction over the appeal due to Bowles's untimely notice of appeal. Indeed, the Warden devoted pages 1 to 4 of his brief to the lack of jurisdiction. Thus, Bowles is flat wrong when he says that the the Warden made only a "passing reference" to untimeliness in his brief and only "obliquely allud[ed]" to dismissal of the appeal. See Pet. Br. 7. It is Bowles, not the Warden, who failed to discuss the issue in his briefs to the appellate court. See Pet. App. 13.

The case was submitted on the briefs. On October 31, 2005, after briefing was completed but before the panel issued its decision, the Court decided *Eberhart v. United States*, clarifying the distinction between certain inflexible claim-processing rules and prerequisites of subject matter jurisdiction. The Sixth Circuit filed its opinion dismissing

Bowles's appeal on December 28, 2005, in which it acknowledged and distinguished *Eberhart* in a footnote. The court of appeals denied Bowles's petition for rehearing and rehearing en banc. Pet. App. 9. Bowles's petition for certiorari followed.

REASONS FOR DENYING A WRIT OF CERTIORARI

The Petition should be denied, because, contrary to Bowles's assertions, the Sixth Circuit's decision does not conflict with the Court's precedent. This case does not involve the same type of procedural rule at issue in *Eberhart*, and in any event, does not involve government forfeiture of the relevant procedural argument. The Sixth Circuit also properly applied the Court's precedent in declining to find that a unique circumstance excused Bowles's untimely appeal. Finally, the decision below is correct on the merits, so there is no reason to disturb it.

A. The decision below does not conflict with, or even implicate, the Court's decision in *Eberhart*.

Bowles incorrectly asserts that the Sixth Circuit decision conflicts with *Eberhart v. United States*, 126 S. Ct. 403 (2005). But the Sixth Circuit properly cited *Eberhart* and considered its application to Bowles's case. But, as the appeals court noted, *Eberhart*'s holding is not implicated here for two reasons:

1. The Warden did not forfeit his argument that Bowles's appeal was untimely.

Bowles falsely asserts that the Sixth Circuit "sua sponte" dismissed his appeal as untimely. In fact, the court's discussion of Bowles's untimely filing was not sua sponte. Instead, the court analyzed the timeliness argument raised by the Warden. Thus, the case does not even present the question that Bowles poses: "whether an appellate court may sua sponte dismiss an appeal . .

. ." Pet Br. at i (emphasis omitted). More significantly, the Warden's timely raising of the deadline argument makes *Eberhart* inapposite.

In *Eberhart*, the Court held that arguments pertaining to certain inflexible claim-processing rules are not properly considered "jurisdictional," and thus may be forfeited by a party's failure to timely assert them. 126 S. Ct. at 405-07. The government had opposed a party's motion under Fed. R. Crim. P. 33 for a new trial on the merits, but then objected to the motion as untimely only after the district court had granted the motion on the merits. Because the government forfeited its untimeliness argument, and because the court of appeals could not sua sponte dismiss on account of the nonjurisdictional Rule 33 violation, the Court ordered the appeal remanded for consideration on the merits. *Id.* at 407. *Eberhart* admonished courts that "failure to object to untimely submissions entails forfeiture of the objection." *Id.* at 406.

The Sixth Circuit's decision in no way conflicts with *Eberhart*. Although the Sixth Circuit's opinion speaks of lacking "jurisdiction," see Pet. App. 19, the terminology is irrelevant where, as here, the untimeliness issue was raised by the party and not sua sponte by the court. The Sixth Circuit observed that the Warden's brief properly included an objection to the timeliness of Bowles's appeal, and that the government "did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court." Pet. App. 14 n.1. Because forfeiture was not an issue here, the Sixth Circuit correctly concluded that *Eberhart*'s claim-processing-versus-jurisdictional distinction would not affect the outcome of Bowles's case. Thus, Bowles's fundamental disagreement with the Sixth Circuit's decision is not the meaning of *Eberhart*, but rather the conditions of forfeiture.

Bowles offers no rationale for why the Sixth Circuit's fact-sensitive forfeiture determination is an issue appropriate for the Court's review. Even if the Court were inclined to review appellate courts' conclusions regarding forfeiture, the Sixth Circuit committed no error. The Sixth Circuit properly concluded that the Warden was under no obligation to raise the untimeliness argument any sooner than his brief on appeal. Bowles offers no argument or authority to support his theory that the Warden was obligated to object to Bowles's untimely filing before it even occurred.

2. The rule barring untimely appeals from a district court to a court of appeals is jurisdictional in nature.

In *Eberhart*, the Court reemphasized its instruction in *Kontrick v. Ryan* that the label "jurisdictional" should apply only "for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." See 126 S. Ct. at 405. Mere "claim-processing" rules, by contrast, are not jurisdictional. *Id.* Specifically, the Court classified Federal Rules of Criminal Procedure 33 and 45(b)(2) as nonjurisdictional claim-processing rules. *Id.* These rules combine to bar a district court from entertaining a motion for a new trial filed more than seven days after the guilty verdict, except motions based on newly discovered evidence.

In contrast, the rules implicated in Bowles's case combine to restrict the time in which a party may take an appeal to a court of appeals. See Fed. R. App. P. 3, 4(a)(6), and 26(b). The Sixth Circuit observed that, unlike the rules at issue in *Eberhart*, these rules were part of legislation passed by Congress to limit the jurisdiction of federal appellate courts. See Pet. App. 14 n.1 (citing Act of December 9, 1991, Pub. L. 102-198, § 12, 105 Stat. 1623, 1627 ("the

district court may . . . reopen the time for appeal for a period of 14 days . . . .")). Thus, the Sixth Circuit concluded, "we think that Rule 4(a)(6) is, in fact, 'a prescription[] delineating the classes of cases that we may hear,'" See Pet. App. 14 n.1 (quoting *Kontrick*, 540 U.S. at 455). The Sixth Circuit's interpretation of how *Eberhart* and *Kontrick* should apply to a *different* procedural rule cannot constitute a direct conflict with *Eberhart*, and Bowles's argument that such a conflict exists clearly fails.

Even if the Court sought to clarify whether Rule 4(a) is jurisdictional or a mere claim-processing rule, this is a poor case in which to do so. Most importantly, this case does not present the issue, because the lack of government forfeiture ensures that the jurisdictional/nonjurisdictional distinction is not outcome-determinative. Whatever mistaken assumption the Sixth Circuit panel may have held regarding the jurisdictional nature of Bowles's procedural default, it is irrelevant to the case's disposition.

Furthermore, no conflict exists among the circuit courts. The Court decided *Eberhart* less than a year ago. Since then, the circuits have had little opportunity to apply it in circumstances in which the jurisdictional question mattered. For the most part, courts faced with the question of whether 4(a) is jurisdictional have found no need to answer it, either because they found no error in the rule's application, see *Touchstone Marketing Inc v. Qwest Communications*, No. 05-2935-cv, 2006 Lexis 10163, at *3 n.1 (2d Cir. Apr. 19, 2006), *In re Special Grand Jury*, 450 F.3d 1159, 1166 (10th Cir. 2006), or because the appellee had not forfeited the Rule 4(a) argument, see *United States v. Carelock*, No. 05-3515, 2006 Lexis 21220, at *7 n.6 (3d Cir. Aug. 18, 2006). Furthermore, those few courts that have attempted to answer the question of Rule 4(a)'s jurisdictional status, either in holding or dicta, have reached the same conclusion

that the Sixth Circuit did here. See *Demorest v. Ryan*, 156 F. App'x 931 (9th Cir. 2005) (holding); *Carelock*, 2006 Lexis 21220, at *7 n.6 (dicta). There is no conflict for the court to resolve, and the Court should allow the circuits more opportunity to apply *Eberhart* before revisiting it.

B. The decision below does not conflict with *Thompson*, *Harris Truck*, or *Osterneck* in its application of the unique circumstances doctrine to the facts of this case.

Bowles incorrectly alleges that the Sixth Circuit's strict enforcement of the Rule 4(a) deadlines conflicts with the Court's decisions in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964). The Court in both of these cases applied a "unique circumstances" exception to permit deviation from otherwise hard-and-fast procedural rules. Bowles implies that the Sixth Circuit failed in its efforts to distinguish the facts of *Harris Truck Lines*. Pet. Br. 5. Bowles also claims that his situation is "governed" by *Thompson* because the Court there excused a district court's grant of an untimely motion for a new trial where the government failed to object to the untimeliness of the motion. Pet. Br. 7. Bowles is incorrect in his reading of both cases.

In *Harris Truck*, the Court first articulated the principle that has become known as the "unique circumstances" doctrine. The district court had extended the appellant's time for filing a notice of appeal because it found "excusable neglect or good cause," as explicitly permitted by the federal rules. The Seventh Circuit dismissed the appeal, finding that the circumstances did not, in fact, amount to excusable neglect, and that the appeal was therefore untimely. The Supreme Court reversed, noting:

> In view of the obvious great hardship to a party who relies upon the trial judge's findings of "excusable neglect" prior to the expiration of the 30-day period and

> then suffers reversal of the finding, it should be given great deference by the reviewing court.

371 U.S. at 217.

Bowles's appeal is untimely not because of any judicial error in evaluating what constitutes excusable neglect, but because Bowles missed a clear procedural deadline. Unlike the appellant in *Harris Truck*, Bowles did not need to rely upon an assurance from the court: Calculations of deadlines, unlike determinations of excusable neglect, do not turn on the exercise of judicial discretion. Bowles could have calculated the relevant deadline under the rules regardless of any representation by the district court. Furthermore, unlike in *Harris Truck*, the district court action here did not turn on a "finding" entitled to the Sixth Circuit's deference, because the proper calculation of deadlines is governed entirely by the Rules and needs no judicial finding. In short, *Harris Truck* does not control the outcome of Bowles's appeal, and the Sixth Circuit's decision in no way conflicts with *Harris Truck*.

The facts of *Thompson* likewise do not control Bowles's case. In *Thompson*, the government failed to object to the timeliness of the petitioner's post-trial motions until the court had already ruled on the merits of the motions. On appeal, the government then attempted to retroactively challenge the timeliness of an already completed proceeding in order to attack the timeliness of the subsequent proceeding, the date of which had been calculated based upon the assumption that the prior proceeding had been legitimate. See 375 U.S. at 385. The Court ruled that, as in *Harris*, "the petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal," and "the District Court concluded that the act had been properly done." The Court therefore vacated the court of appeals's judgment dismissing the appeal and remanded for determination on the merits. *Id.* at 387. Here, unlike the appellee in *Thompson*, the

Warden did not wait until the untimely proceeding was complete before challenging its untimeliness. As noted above, the Warden properly argued the untimeliness of Bowles's appeal in his appellate response brief.

Bowles fails to cite the Court's more recent precedent governing the unique circumstances doctrine: *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). In *Osterneck*, the Court clarified that the unique circumstances exception is to be strictly construed, and that it "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done." *Id.* at 179. *Osterneck* demonstrates that the Sixth Circuit's opinion is not at odds with Supreme Court precedent. Given that *Osterneck* instructs lower courts to apply the unique circumstances exception sparingly, the decision below cannot be said to conflict with *Harris Truck* or *Thompson* merely because it failed to extend those cases to a new factual circumstance.

As Bowles himself notes, the decision below properly cited *Harris Truck*. It also properly cited *Thompson* and *Osterneck*. The Sixth Circuit carefully reviewed these cases and applied the rules set forth in them. See Pet. App. 15-17. Thus, Bowles's true complaint is not with any conflict between the decision below and Court precedent, but rather with the Sixth Circuit's factual application of a properly stated rule of law.

Even if incorrect application of a proper rule of law warranted the Court's review, see Sup. Ct. R. 10, such review would be unneeded here, as the Sixth Circuit did not err in its application. The Sixth Circuit correctly noted that the incorrect deadline supplied by the court could not fall within the unique circumstances exception under *Osterneck*, because the

seventeen-day extension to file a notice of appeal is not an act that could ever be "properly done," as the language of Rules 4(a)(6) and 26(b) make clear. See Pet. App. 15-17.

The decision below is consistent with the Eleventh Circuit's approach in *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, (11th Cir. 1991). In *Pinion*, the court, noting "*Osterneck's* strict construction of the 'unique circumstances' exception," refused to grant relief to a party who relied upon a district court's order giving an extension of time for filing a post-trial motion, an order that was prohibited under the Rules. *Id.* at 1534. The Eleventh Circuit reasoned that the party was not reasonable in relying upon a district court's improper action "in spite of the explicit language of [the] Rule." *Id.* at 1532-33. In Bowles's case, just as in *Pinion*, "[t]he reasonableness of [the party's] reliance on the action of the district court is severely undercut by the ease with which it could have read [the Rule]. Simply scanning the Rule would have provided notice that there was an inconsistency between the Rule's text and the court's consent order." *Id.* at 1534.

The Third Circuit, likewise, has denied relief when a party relied upon a district court's minute order granting an extension of time to file a Rule 59(e) motion. See *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989). The court of appeals in *Green* noted that "*Osterneck*'s strict construction of the 'unique circumstances' doctrine may occasionally produce a harsh result when an erroneous extension has been granted," but observed that, to avoid future harsh results, the appellate court was emphasizing to district courts the meaning of the relevant Rule. *Id. See also Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3d Cir. 1990) ("The unique circumstances doctrine has never been extended to an attorney's miscalculation of the

applicable time limits, and we see no reason to do so here even if the trial judge also shared that incorrect assumption.").

The Fourth Circuit and Tenth Circuit have also focused on the "properly done" language of *Osterneck*, and refused to permit an untimely filing authorized by the district court where such an action can "never be 'properly done.'" See *Panhorst v. United States*, 241 F.3d 367, 372-73 (4th Cir. 2000); *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000). In both cases, the court stressed that litigants have a duty to familiarize themselves with the relevant Rules, and that if the appellant had done so he could have easily avoided the filing error at issue. *Panhorst*, 241 F.3d at 372-73; *Weitz*, 214 F.3d at 1180. The Tenth Circuit emphasized that "the mere fact that a court has granted . . . an extension does not justify reliance that is clearly at odds with the text of the rules." *Id.* It added:

> It makes great practical sense to require the parties to comply with clearly mandated requirements in the Federal Rules. Otherwise, we would be encouraging litigants to invite courts to commit easily avoidable errors. District courts today suffer under a burdensome caseload, and a certain degree of cooperation and assistance from litigants is essential to the judicial system's effective operation.

Id.

Bowles relies solely upon the alleged conflict between the decision below and the Court's precedent, and he does not even allege a circuit split in the application of *Harris Truck* and its progeny. The Warden observes that some courts of appeals have acknowledged differences in how broadly courts apply the unique circumstances exception. See, e.g., *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992) (noting "some disagreement among the circuits about the scope of the doctrine"); *Pinion*, 928 F.2d at 1529-31 (collecting cases). However, the variations among and within courts in their applications of the law do not rise to the level of a conflict on the

meaning of the law. The language of *Osterneck* is clear in its instruction to apply the unique circumstances doctrine narrowly, and the Sixth Circuit properly did so.

Even if the Court were inclined to revisit or further clarify *Osterneck*, this case provides a poor opportunity to do so. Whatever the outer boundaries of the unique circumstances exception might be, they do not extend to a case such as this, in which the district court committed an error of arithmetic that would be obvious to any attorney who had consulted the relevant Rules. A district court's mistaken extension of a deadline beyond what the Rules allow cannot constitute an exceptional circumstance, since such an exception would vitiate the rule set forth in Fed. R. App. P. 26(b) that "the court may not extend the time to file a notice of appeal." *Cf. Bailey v. Sharp*, 782 F.2d 1366, 1371 (7th Cir. 1986) (Easterbrook, J., concurring) (noting, in context of a different rule, that "[u]nless every effort to extend the time is a 'special circumstance' justifying the extension—in which event Rule 6(b) is a dead letter, each violation a self-fulfilling prophecy—the district court's order . . . had no effect"). If a district court's enlargement of an appeal window in contravention of Rule 26(b) were a "unique circumstance," then Rule 26(b) would be meaningless: Courts would be free to violate the prohibition against extending appeal deadlines by simply ignoring it, knowing that any improper order would be immune from review once an appealing party had "relied" upon it.

C. The decision below was correct on the merits.

Bowles also insists that the Sixth Circuit committed miscellaneous errors in rejecting his untimely appeal. But he is wrong. So even if simple error satisfied the Court's criteria for certiorari review, see Sup. Ct. R. 10, none of Bowles's arguments of error has merit.

Bowles insists that "the court misread the rules of appellate procedure governing extensions of time." Pet. Br. 6. He argues, without support, that "[t]he 180 day time limit is the only time that cannot be extended." *Id.*

The unambiguous language of the rules contradicts Bowles's assertion. Rule 26(b) expressly prohibits extensions of time to file an appeal other than "as authorized in Rule 4." Rule 4, in turn, expressly limits the reopening of the time to file an appeal to a period of fourteen days. See Fed. R. App. P. 4(a)(6). The plain language cannot be reconciled with Bowles's assertion that the fourteen-day extension set forth in Rule 4 is flexible or open to district court enlargement. See also *United States ex rel. McAllan v. City of New York*, 248 F.3d 48, 52-53 (2d Cir. 2001) (noting that district court does not have authority to extend fourteen-day time period under Rule 4(a)(6)).

Bowles's further argument is also mistaken. Bowles says that, even if the Sixth Circuit properly interpreted the procedural rule at issue, it applied the wrong "remedy." Bowles argues that he was entitled to a remand to the district court, where the district court could vacate its mistaken order and enter a new order that properly calculated Bowles's fourteen-day deadline. Pet. Br. 6. But Bowles cites no authority for his proposed solution, which cannot be reconciled with the statute's language. Rule 4(a)(6) requires that any motion to reopen be filed within 180 days of judgment or within seven days after receiving notice of the judgment, whichever is earlier. By the time the Sixth Circuit issued its opinion on the merits of Bowles's appeal, more than two years had passed since both the district court's final appealable order and Bowles's receipt of notice. Any remand from the circuit court would not have cured the fact that any properly-calculated deadline for Bowles's appeal has already long passed.

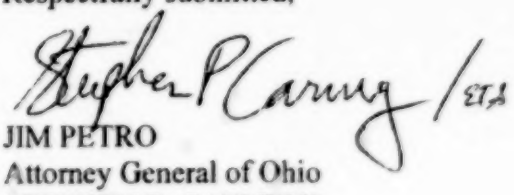
Finally, Bowles misses the mark in his reliance upon *New Hampshire v. Maine*, 532 U.S. 742 (2001), and in his insistence that the doctrine of judicial estoppel applies here. The Warden did not assume one position and later adopt a different one, as the Warden has never argued that Bowles's notice of appeal was timely. Nor did the Warden "sit[] back, say[] nothing, and obliquely allud[e] in his brief" to the untimeliness of Bowles's appeal, as Bowles alleges. Pet. Br. 7. On the contrary, as explained above, the Warden properly raised the deadline issue in his merits brief to the court of appeals.

In short, the decision below was correct, and does not warrant review.

CONCLUSION

For the above reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,



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Harry Russell, Warden

November 9, 2006

No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the enclosed RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI were served by first class U.S. mail, postage prepaid, on the 9th day of November, 2006, upon the following counsel:

Paul Mancino, Jr.
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All persons required to be served have been served.

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William K. Suter, Clerk of Court
The United States Supreme Court
One First Street, NE
Washington, DC 20543

Re: *Keith Bowles v. Harry Russell, Warden*
Case No. 06-5306

Dear Mr. Suter:

Enclosed are ten (10) printed copies of the Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

The certificate of service is also enclosed.

Respectfully yours,

JIM PETRO
Attorney General of Ohio

Stephen Carney

STEPHEN P. CARNEY
State Solicitor

SPC:am
Enclosure